

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 05-0329; 05-0330
Cigarette Tax & Use Tax
For Tax Years 2003 and 2004

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-1-5; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

III. Tax Administration—Negligence Penalty and Interest

Authority: IC 6-8.1-10-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax, use tax, and penalty on cigarettes ordered and delivered into Indiana. Taxpayer protests that he does not owe these taxes. Taxpayer also mentioned during the telephone hearing that he was protesting cigarette tax assessments for the year 2005. No protest information for 2005 is included in the file. Thus this Letter of Finding only addresses the period prior to the year 2005. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

The Indiana Administrative Code also states “[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer...” 45 IAC 15-5-3(b).

The Department's proposed assessment is based on information received pursuant to the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes.

Taxpayer did not file a return with the Department which included the cigarette taxes. The Department refers to IC 6-8.1-5-1(a), which states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

The Department received information from the vendor naming taxpayer as the purchaser of cigarettes. The Department made proposed assessments based on the best information available to it, as provided by IC 6-8.1-5-1(a).

Taxpayer protests the imposition of cigarette tax. Taxpayer argues that he does not owe cigarette tax. Taxpayer states in correspondence:

[T]his is double taxation, which I do not believe is Federally Legal unless you give me an avenue to seek a refund from Kentucky for the tax collected. Kentucky tax stamps are on the cigarette packs, so a cigarette tax was already paid on these packs.

Regarding the taxpayer's “double taxation” argument, the Indiana cigarette tax (found at IC 6-7-1-1) states:

It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

(*Emphasis added*). As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, telephone, or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

Returning to the taxpayer's argument, as IC 6-7-1-1 makes clear, the taxpayer's cigarettes were taxable in Indiana. The taxpayer does not develop his "double taxation" argument beyond the assertion quoted above. As already indicated, the taxpayer has the burden of proof, and has failed to meet it regarding the "double taxation" argument. If the taxpayer did in fact pay a cigarette tax to Kentucky on the cigarettes at issue (the taxpayer did not supply any documentation to that effect), any remedy (if there is one) would have to be sought with Kentucky.

Taxpayer also argues the number of cigarettes purchased in 2004. Taxpayer states:

According to my recorders [*sic*], which I have provided a report from my Quicken, I received 11 orders from [Company X] in 2004 totaling 108 cartons/1080 pack of cigarettes. We consumed 1000 of these packs, 80 packs were given as gifts to relatives in Ill. and TN. Not sure the gifts are taxable either.

Dealing with this in reverse order, regarding the (purported) gifts argument, taxpayer does not develop this argument, but it should be recalled that IC 6-7-1-1 states (*Emphasis added*):

It is the intent and purpose of this chapter to levy a tax on *all* cigarettes sold, used, consumed, *handled*, or *distributed* within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes....

Turning to the number of cigarettes purchased, taxpayer seems to be arguing that he was billed for purchases he did not make. However, what the taxpayer fails to note is the fact that he also made purchases in 2003. The taxpayer has been billed for 2003 *and* 2004.

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on his purchase of cigarettes ordered and delivered into Indiana. The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also of relevance is 45 IAC 2.2-3-4, which states:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

Taxpayer challenges the number of cigarettes purchased and "shipping which is not taxable." Regarding the number of cigarettes purchased, that was dealt with already in Issue I. It should be noted that shipping is in fact taxable under IC 6-2.5-1-5. (It should

also be noted that taxpayer provided one receipt for a 2005 purchase—not a 2003 or 2004 purchase. However, if this receipt is indicative of the cost of the cigarettes for 2003 and 2004, it goes against the taxpayer’s argument, since if it truly is representative of 2003 and 2004 then it appears the Department may have *under* billed the taxpayer for use tax).

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use, or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer’s protest is denied.

III. Tax Administration—Negligence Penalty and Interest

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to IC 6-8.1-10-1, which states in relevant part:

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

...

(e) The department may not waive the interest imposed under this section.

Since taxpayer incurred a deficiency upon a determination by the Department, as explained in Issues I and II, the Department may not waive interest under IC 6-8.1-10-1.

With regard to the penalty, the Department refers to IC 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC 6-8.1-10-2.1(a). Taxpayer has not affirmatively established that his failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is denied.